86-506

Supreme Court, U.S.
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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

LAWRENCE WILLIAMS

Petitioner,

vs.

STATE OF HAWAII

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF HAWAII

PETITION OF LAWRENCE WILLIAMS FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Due Process Clause of the Fourteenth Amendment and the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution preclude the State from reprosecuting the Petitioner for Driving Under the Influence (DUI), Second Offense, where he pled guilty to the DUI charge, was sentenced, paid his fine and lost his driver's license for 30 days, yet the State Supreme Court held, sua sponte, his guilty plea was void to the DUI charge since the trial court had failed to advise him of the penalties; hence, the case was remanded for new trial.

2. Whether the trial court, two and one-half months after sentencing the Petitioner to First Offense DUI, may, without violating the Due Process Clause

of the Fourteenth Amendment and the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, without changing the charge and without proper proof of a prior conviction of DUI, increase the sentence to a Second Offense DUI charge under **HRS §291-4.**

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HAWAII SUPREME COURT OPINION

The opinion, **STATE OF HAWAII vs. LAWRENCE WILLIAMS** is found at 720 P.2nd 1010, (1986) and is included in the Appendix (App. 1-8).

SUPREME COURT JURISDICTION

The Opinion of the Supreme Court of the State of Hawaii was entered on June 17, 1986. A timely Motion for Reconsideration was denied without argument on July 11, 1986. The Judgment on Appeal of the Supreme Court of the State of Hawaii was entered on July 17, 1986. The jurisdiction of the Court is invoked under **28 U.S.C. §1257(3).**

CONSTITUTIONAL PROVISIONS, STATUTE, AND RULE INVOLVED

Fifth Amendment to the United States Constitution:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment to the United States Constitution:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Hawaii Rules of Penal Procedure, Rule 11(c):

"(c) Advice to Defendant. The court shall not accept a plea of guilty or nolo contendere without first addressing the defendant personally in open court and determining that he understands the following:

(1) the nature of the charge to which the plea is offered; and

(2) the maximum penalty provided by law, and the maximum sentence of extended term of imprisonment, which may be imposed for the offense to which the plea is offered; and"

Hawaii Revised Statutes, §291-4:

"§291-4 Driving under the influence of intoxicating liquor. (a) A person commits the offense of driving under the influence of intoxicating liquor if:

(1) The person operates or assumes actual physical control of the operation of any vehicle while under the influence of intoxicating liquor; or

(2) The person operates or assumes actual physical control of the operation of any vehicle with 0.10 per cent or more, by weight of alcohol in the person's blood.

(b) A person committing the offense of driving under the influence of intoxicating liquor shall be sentenced as follows without possibility of probation or suspension of sentence:

(1) For a first offense, or any offense not preceded within a

five-year period by a conviction under this section, by:

(A) A fourteen-hour minimum alcohol abuse rehabilitation program including education and counseling, or other comparable program deemed appropriate by the court; and

(B) Ninety-day prompt suspension of license with absolute prohibition from operating a motor vehicle during suspension of license, or the court may impose, in lieu of the ninety-day prompt suspension of license, a minimum thirty-day prompt suspension of license with absolute prohibition from operating a motor vehicle and, for the remainder of the ninety-day period, a restriction on the license that allows the person to drive for limited work-related purposes and to participate in alcoholism treatment programs; and

(C) Any one or more of the following:

(i) Seventy-two hours of community service work; or

(ii) Not less than forty-eight hours of imprisonment; or

(iii) A fine of not less than $150 but not more than $1,000.

(2) For an offense which occurs within five years of a prior conviction under this section:
(A) Prompt suspension of license for a period of one year with the absolute prohibition from operating a motor vehicle during suspension of license;
(B) Either one of the following:
(i) Not less than eighty hours of community service work; or
(ii) Not less than forty-eight consecutive hours of imprisonment; and
(C) A fine of not less than $500 but not more than $1,000.

(3) For an offense which occurs within five years of two prior convictions under this section, by:
(A) A fine of not less than $500 but not more than $1,000.
(B) Revocation of license for a period not less than one year but not more than five years; and
(C) Not less than ten days but not more than one hundred eighty days imprisonment.

(4) Notwithstanding any other law to the contrary, any conviction for driving under the influence of intoxicating liquor, shall be considered a prior conviction.

(c) Whenever a court sentences a person pursuant to section 291-4(b)(2) or

(3), it shall also require that the offender be referred to a substance abuse counselor who has been certified pursuant to section 321-193 for an assessment of the offender's alcohol dependence and the need for treatment. the counselor shall submit a report with recommendations to the court. The court may require the offender to obtain appropriate treatment.

All cost for such assessment or treatment or both shall be borne by the offender.

(d) Notwithstanding any other law to the contrary, whenever a court revokes a person's driver's license pursuant to the provisions of this section, the examiner of drivers shall not grant to such person an application for a new driver's license for such period as specified by the court.

(e) As used in this section the terms "driver," "driver's license," "examiner of drivers," and "vehicle" shall have the same meanings as provided in section 286-2. [L 1949, c 283, pt. of §1; RL 1955, §311-28; HRS §291-4; am L 1982, c 251, §1; am L 1983, c 117, §1; am L 1984, c 193, §1; am L 1985, c 86, §1]"

STATEMENT OF THE CASE

On May 8, 1985, the Petitioner was charged with driving under the influence of intoxicating liquor in violation of **HRS §291-4(a)(1)(2)** (App. 26). After waiving

reading of the charge, jury trial and tendering a guilty plea, the Court explained his constitutional rights and found that the guilty plea was voluntarily and freely entered (App. 15). Based upon the acceptance of the voluntary plea and the statement from the prosecutor that this was the Petitioner's first conviction, the Court found there was no prior conviction and adjudged the Petitioner guilty as charged, imposing the sentence: "Directs the Defendant to report to Driver's Education for fourteen hours of DWI classes, suspends his driver's license for a period of thirty days absolutely, and for the next sixty days thereafter, conditional and restrictive, allows him to drive to and from work during working hours only and make him pay the fine of $150.00." (App. 16-17). Following that, the Petitioner paid his

fine and made arrangements to take the driver's education course.

On July 22, 1985, Petitioner was ordered to appear again before the District for amendment of the sentencing, at which time the sentence, over objection of the Petitioner, was amended as if the conviction were a second conviction. The Court suspended his license for one (1) year effective as of the date his license was suspended in the prior sentencing, and he was ordered to do eighty (80) hours of community service work and pay a $500.00 fine (App. 24). The Court denied defense motion to stay the sentence in order that he may appeal to the Supreme Court.

At the July 22, 1985 hearing, the prosecutor simply stated that the case had been "scheduled for re-sentencing as the Defendant was sentenced as a first

offender but does have a 1983 conviction" (App. 19-20). Objection was made to the procedure, since the Petitioner was simply charged with first offense, but the Court disagreed since "nobody specifies whether it's first or second" (App. 20). Next the objection was that there was no notice that there was any complaint against the Petitioner for enhanced punishment of second or third offense (App. 21). In fact, the prosecutor had only charged the Petitioner with first offense (App. 21), and there was no evidence before the Court about any prior offense (App. 21). The Court considered such objection inapplicable and proceeded to modify the sentence by increasing the fine and the community service and revoking the license for one year (App. 24).

From that Judgment, the Petitioner appealed to the Supreme Court of the State

of Hawaii. The issue squarely before the Court was whether the trial court, some two and one-half months after the sentencing of the Petitioner to the First Offense DUI charge, could properly, without changing the charge and without any proper proof of a prior conviction of DUI, increase the sentence so as to sentence the Petitioner as Second Offense DUI offender under **HRS §291-4**. Ancillary to that central issue, were the issues of whether the Petitioner was entitled to reasonable notice that he was being charged with a prior conviction before he enters his guilty plea and whether the repeat-offender provisions regarding proof of prior conviction and showing that the Petitioner was represented by counsel or an effective waiver thereof apply to DUI cases at the time of sentencing.

The Supreme Court of Hawaii, rather that deciding those serious issues, elected to remand the case for retrial, holding that the plain-error rule required them to hold the Petitioner's guilty plea and sentence were void since the trial court did not comply with the **Hawaii Rules of Penal Procedure Rule 11(c)** in that the trial court failed to inform the Petitioner of the penalties which could be imposed for the DUI charge to which he had pled guilty and in failing to inquire as to whether he knew of or understood the penalties.

The Supreme Court of Hawaii denied the Petitioner's Motion for Reconsideration, and the Judgment on Appeal was rendered July 17, 1986, remanding the appeal for a new trial.

This Court has jurisdiction pursuant to **28 U.S.C. §1257** from the final judgment

entered July 17, 1986. See **COX BROADCASTING CORP. vs. COHN**, 420 U.S. 469, (1975). Also **FLORIDA vs. MEYERS**, 466 U.S. 380, (1984), which held that a final judgment exists even where there is a remand for retrial, because otherwise the Federal issue presented on this petition would be moot. **FLYNT vs. OHIO**, 451 U.S. 619, (1981) is contra. This case is within the four **Cox** exceptions when remand is ordered because the Federal issues will be mooted unless decided now rather than after re-trial. The issues raised in this case appear to be of first impression.

The constitutional issues were raised in the trial court in the first instance at the resentencing of the Petitioner on July 22, 1985, and again raised in the Hawaii Supreme Court in the Statement of Points of Error, because the resentencing

violated the Double Jeopardy and Due Process Clauses of the United States Constitution. However, the Hawaii Supreme Court did not pass on such issues, but simply remanded the case for a new trial because the Court determined sua sponte that the guilty plea to the DUI charge was invalidly entered because the trial court neglected to advise the Petitioner of the penalties to which he would be subjected upon his guilty plea.

ARGUMENT

I. THE HAWAII SUPREME COURT DECISION TO REMAND FOR RE-TRIAL BECAUSE OF AN INVALID GUILTY PLEA IS CONTRARY TO THE UNITED STATES SUPREME COURT OPINIONS AND OTHER FEDERAL AND STATE DECISIONS.

The opinion entered June 17, 1986 decided this case on the basis that the

Petitioner's guilty plea to the DUI charge and, correspondingly, any sentence entered thereafter, was void under the plain-error rule, as per **STATE vs. VAITOGI**, 59 Haw. 592, 585 P.2nd 1529, (1978). The basis of that reasoning is that the trial court neglected to advise the Petitioner prior to accepting his guilty plea of the maximum penalty provided by law as required by **Rule 11(c)** of the **Hawaii Rules of Penal Procedure.** The Court went on to hold that this was constitutionally required by an affirmative record showing that the Petitioner had been apprised of the consequences of his plea of guilty as per **Viatogi**. Then the Court held the trial court committed reversible error and deprived the Petitioner of his due process rights by failing to vacate his plea and allow him to plead guilty or enter a plea to a second-offense DUI charge after

complying with **HRPP 11**, again as per **Viatogo**.

The difficulty with all of this is that the Petitioner did in fact enter a valid guilty plea to the DUI charge, since the record is abundantly clear that all he was charged with was DUI first offense, and he made no objection to the sentencing and in fact paid the fine of $150.00, surrendered his license for 30 days, and undertook the punishment by making arrangements to take the driver's education course. Only on July 22, 1985, over his objection, was the sentence amended in violation of the Double Jeopardy Clause of the United States Constitution. However, the Court did not reach that issue, simply holding that his plea was invalid despite the lack of any such issue being raised by any of the parties to this appeal. Apparently, the

Court felt constrained to do justice, but the net effect is that the Petitioner apparently will now be subjected to a harsher penalty or enhanced punishment in the event that the prosecution is able to prove at the new trial the prior offense, assuming that he is now in fact charged with the prior offense. It is not clear from the opinion whether the Court construed the Petitioner to be charged with the DUI first offense or second offense. Assuming arguendo that he is now being charged with DUI second offense, it will be a simple matter for the prosecution to embark upon that amended complaint, all to the Petitioner's prejudice and detriment. It doesn't seem fair that **Rule 11** should be used to the detriment of the Petitioner and the benefit of the prosecution, particularly

where the Petitioner did not make a **HRPP Rule 32(d)** application to withdraw his guilty plea. That is the section under which he would be permitted to withdraw his guilty plea if the Court, in its discretion, saw fit to grant it "to correct mainfest injustice the Court after sentence shall set aside the judgment of conviction and permit the defendant to withdraw his plea.". Here the Petitioner did not ask to withdraw his guilty plea, but the Court apparently saw fit to do so on its own motion, but can only do so to correct manifest injustice to the defendant. The only manifest injustice that is observed is that the Petitioner is now subject to a harsher penalty because the prosecution is apparently now going to charge him with second offense, having neglected to charge him with that the first time around, the State gets two

bites out of the apple. That is mainfestly unjust. But for the driver's education letter and the Petitioner's voluntary appearance in court at the "re-sentencing", the Petitioner's sentence was valid in every respect and his plea was validly entered as shown by the following cases.

UNITED STATES vs. TIMMRECK, 441 U.S. 780, (1979), held that a conviction based on a guilty plea is not subject to collateral attack in a post-conviction proceeding when all that is shown is a formal violation of **Rule 11** of the **Federal Rules of Criminal Procedure**, since such a violation was neither constitutional or jurisdictional nor can the defendant successfully claim that the error there resulted in a "complete miscarriage of justice" or in a proceeding "inconsistent with the rudimentary demands of fair

procedure", citing **HILL vs. UNITED STATES**, 368 U.S. 424, 428, in support thereof. There the defendant contended unsuccessfully that a trial court, in accepting the guilty plea, advised the defendant the maximum punishment would be 15 years imprisonment and a $25,000 fine, but the judge failed to described the mandatory special parole terms of at least three years required by the applicable statute. After accepting the guilty plea, the Court sentenced defendant to ten years imprisonment plus a special parole term of five years and a fine of $5,000. Defendant did not take a direct appeal from that sentence, but only collaterally attacked it in the **$2255** proceeding, claiming that the trial court had violated **Rule 11** by accepting his plea without informing him of the mandatory special parole terms. In holding that there was

no prejudice to the defendant by the failure to comply with the formal requirements of **Rule 11**, the Court said:

> "Nor can any claim reasonably be made that the error here resulted in a "complete miscarriage of justice" or in a proceeding "inconsistent with the rudimentary demands of fair procedure". Respondent does not argue that he was actually unaware of the special parole terms or that, if he had been properly advised by the trial judge, he would not have pleaded guilty. His only claim is of a technical violation of the Rule. That claim could have been raised on direct appeal, see McCARTHY vs. UNITED STATES, 394 U.S. 459, but was not. And there is no basis here for allowing collateral attack "to do service for an appeal". SUNAL vs. LARGE, 332 U.S. 174, 178."

MIXON vs. UNITED STATES,

608 F.2nd 588, (5th Cir., 1979), held, inter alia, that, since the record was not clear whether the defendant knew the maximum penalties to which he was subject on his guilty plea, the matter was remanded to the trial court for an evidentiary hearing to ascertain if the

defendant had knowledge from any source of the maximum limits of his punishment and if the Court finds that he did not, then his conviction must be set aside. In so holding, the Court reasoned:

> "It was not necessary that the record show that the defendant learned of the maximum penalty from the judge in the plea proceeding, only that he had received knowledge of the matter from any source. CHEELY vs. UNITED STATES, 535 F.2nd 934, 935, (5th Cir., 1976); TUCKER vs. U. S., 409 F.2nd 1291, 1295, (5th Cir., 1969)."

GEORGE vs. UNITED STATES, 633 F.2nd 1299, (9th Cir., 1980), held that, where the trial court neglected to advise the defendant at arraignment of his constitutional right not to be compelled to incriminate himself, such formal requirement did not constitute a constitutional or jurisdictional error, since a formal violation of **Rule 11** is not constitutionally mandated and "that

deviation from it is not per se constitutional error." This is so unless the defendant was in fact unaware of his constitutional right, then it would in fact be a constitutional error and since the defendant testifying at the §2255 hearing did show that defense counsel advised the defendant of his constitutional right to avoid self-incrimination, the defendant entered his plea knowing of such right and that plea would not be disturbed on appeal. This again reinforces the conclusion as set forth in **Timmreck** and **Mixon**, that it is not a constitutional requirement that defendant be apprised of his **Rule 11** "rights" by the trial judge, but that simply the defendant be apprised from any source of the maximum penalty to which he may be subjected by entering a guilty plea.

In **TUCKER vs. UNITED STATES**, 409 F.2nd 1291, (5th Cir., 1969), the case was remanded to the trial court for the limited purpose of determine whether the defendant knew the maximum possible penalties for the charges to which he pled guilty and, if the trial court finds he did not, the trial court was directed to set aside that conviction and grant him a new trial; however, if the Court found that he did know the penalties, such findings were to be made and returned to the appellate court. In so holding, the Court said at Page 1295:

> "The question, however, is not whether he learned of such penalty from the judge, in a formal proceeding, but whether he had knowledge as to such matter, whether it was from the judge, his lawyer, his bondsman or from some other source."

U. S. vs. CROOK, 607 F.2nd 670, (5th Cir., 1979), held that failure to advise the

defendant at arraignment that there was no statutory maximum on the length of a special parole term he could impose did not invalidate the plea under **Federal Rules of Criminal Procedure, Rule 11(c)(1).**

BERRY vs. MINTZES, 726 F.2nd 1142, (6th Cir., 1984), held, inter alia, the fact that the trial judge did not advise the defendant of the punishment for first-degree murder did not invalidate his guilty plea where he was represented by experienced counsel and made no objection at the time of sentence as to the extent of the sentence; consequently, the Court concluded the defendant was sufficiently informed of the consequences of his guilty plea, so that it was voluntary.

SWENSEN vs. MUNICIPALITY OF ANCHORAGE, 616 P.2nd 874, (Alaska, 1980), held, inter alia, that it was a technical violation of **Criminal Rule 11(c)(3)** for the trial court to advise the defendant at arraignment that

action may be taken on his driver's license when a temporary revocation was in fact mandated by the State or the statute with a limited discretionary exception for individuals whose ability to earn a livelihood would be severely impaired by license revocation, was "too insignificant to constitute, in and of itself, a substantial violation of the rule warranting relief. Considered alone, this error is harmless; but a more decisive case of reversible error overall is made out when this error is considered in conjunction with the other errors which we have discussed.".

More recently, in the case of **STATE vs. TACHIBANA**, 67 Haw. ___, 698 P.2nd 287, (1985), the defendant was not entitled to withdraw his plea of guilty after sentencing under **HRPP Rule 32(d)** "to correct mainfest injustice" where the trial court's failure to act according to defendant's expectations of

sentencing did "not give rise to any manifest injustice within the meaning of **Rule 32(d)**.".

Also, **REPONTE vs. STATE**, 57 Haw. 354, 556 P.2nd 577, held that the accused need not be advised prior to accepting his guilty plea about "every conceivable collateral effect the conviction might have".

A mere failure to comply with the requirements of **Rule 11**, which had its counterpart in **Rule 402** of the Supreme Court of Illinois by failing to advise defendant at the time of his guilty plea that he could be imprisoned for one to ten years, did not rise to a constitutional issue "unless the defendant alleges that the failure resulted in an involuntarily or unintelligent plea." *** "The mere contention that a sentence is excessive when it is within the statutory limits similarly fails to raise a constitutional issue. (citations omitted)",

PEOPLE vs. WENGER, 42 Ill.App.3rd 608, 1 Ill.Dec. 306, 356 N.E.2nd 432, (1976).

In **LONO vs. STATE**, 63 Haw. 470, 629 P.2nd 630, (1981), the court had no difficulty in determining that the defendant had probable knowledge of what the sentence was for murder in the first degree; hence, he was not entitled to withdraw a plea of guilty and, therefore, the finding of the trial court that appellant knew of the mandatory sentence of life imprisonment without parole was supported by substantial evidence. There the trial court did not advise the defendant of the maximum penalty for murder in the first degree.

Other states have agreed that it will not invalidate a defendant's guilty plea for failure of the trial court to inform him of the possible penalty if it can be proven otherwise that the defendant knew at the time of his plea by any other means, of the

possible penalties to which he may be subjected upon his guilty plea, **STATE vs. FISCHER**, 220 Neb. 664, 371 N.W.2nd 316, (1985).

CHAPEL vs. STATE, 71 Ore.App. 49, 691 P.2nd 514, (1984), held that the defendant's plea of guilty to the charge of DUI was not invalidated because the trial court failed to advise her that, upon a subsequent conviction for DUI, her driver's license would be suspended for three years. In so holding, the Court said:

> "We conclude that an enhanced driver's license suspension following a subsequent conviction is not a basic legal consequence of a plea to the first charge. The longer suspension period is dependent on their being a subsequent conviction within a five-year period. The petition was properly dismissed."

PEOPLE vs. BROOKS, 135 Mich.App. 193, 353 N.W.2nd 118, (1984), held that the defendant's guilty plea must not be set aside because the trial court failed to

advise him at arraignment that any sentences imposed would have been served consecutively, since such advice was not required.

As stated in **STATE vs. RUIZ**, 49 Haw. 504, 421 P.2nd 305, (1966), "The power to notice error on the Court's own motion will be exercised only in an exceptional case.". Likewise, in **STATE vs. CUMMINGS**, 49 Haw. 522, 423 P.2nd 438, (1967), in order to come within that exception, the appellate court may consider those questions sua sponte if the plain error affects substantial rights or if it "substantially prejudiced the accused". Here the only prejudice to the accused is that it deprives him of his previously valid plea to the DUI first offense charge and permits the prosecution to re-prosecute him for DUI second offense and impose a harsher penalty in the event

of his conviction. Really, the whole matter is moot, because the Petitioner had already been sentenced validly and served the sentence. Here the Petitioner is not seeking to withdraw his plea as was the case in **STATE vs. DICKS**, 57 Haw. 46, 549 P.2nd 729, (1976), nor is this the case where the Petitioner did not understand the charge as in **Vaitogi**, supra.

Here, the Petitioner is the only one that is prejudiced by the Court's determination that his plea was invalid, since he had already accepted his sentence and in fact paid his fine and lost his license for a 30-day period and now will be subjected to losing his license for one year in the event of his conviction on re-trial, all because he did not ask to have his plea vacated. He has invested considerable money appealing, only to find

that now he has to start all over, without even knowing whether he's now being charged with first or second offense, as it's not clear from the opinion. This will only produce a second appeal and not resolve the issues raised on the first appeal about whether the prosecution is required to state in the complaint whether it's first, second or third offense, so that he knows what he is charged with before he enters his plea. The opinion does not address those issues, and they are of considerable importance to, not only this Petitioner, but all similarly charged defendants who have been arraigned and/or convicted in District Court on the DUI charge.

Petitioner further argues that it is only he who can request to withdraw his plea pursuant to **HRPP Rule 32(d)** in order to "correct mainfest injustice". Here the

only mainfest injustice was the trial court's sentencing the Petitioner a second time for a crime which he did not commit and with which he was not charged. To set aside the plea on the basis that the penalty was not explained to the Petitioner flies in the face of logic and the record where he was satisfied with the sentence and undertook to pay the fine and lose his license for a 30-day period.

II. THE RE-SENTENCING OF THE PETITIONER TO ENHANCED PUNISHMENT VIOLATES BOTH THE DUE PROCESS AND DOUBLE JEOPARDY CLAUSES OF THE UNITED STATES CONSTITUTION.

Here, the Petitioner was charged orally with the offense of driving under the influence of intoxicating liquor, first offense, inasmuch as the prosecution did not charge him with any prior offenses

(App. 26). Hence, at the outset, any proof or purported proof of a prior conviction would have been immaterial since he was not charged with a second or subsequent offense. In connection with that procedure, the prosecution must prove the elements beyond a reasonable doubt, **STATE vs. BOEHMER**, 1 H.A. 44, 613 P.2nd 916. Since the **Boehmer** case looked to Nebraska because the statutes are similar on DUI, Petitioner submits that the procedure followed in Nebraska is clearly appropriate for handling DUI cases wherein prior convictions are alleged for enhanced punishment.

HAFFKE vs. STATE, 149 Neb. 83, 30 N.W.2nd 462, announced a rule for enhanced punishment on conviction of second and subsequent offenses for DUI and established a procedure whereby the prosecution was required to allege in the

complaint not only the current offense but the prior offense. That fact should not be an issue upon the trial, nor should it be disclosed to the jury or trier of fact. Once the accused is convicted, before sentence is imposed, a separate hearing was held before the Court without a jury to determine whether there had been any prior convictions under the same statute. In that procedure, the accused should be given notice of the time of the hearing at least three (3) days before and at the hearing, if the Court finds that the accused had been convicted prior thereto under the same statute, the sentence will be imposed accordingly.

Although proof of the prior conviction does not constitute an element of the crime of DUI, the proof of the prior conviction goes only to enhancement

of the punishment, **STATE vs. MANGELSEN**, 207 Neb. 213, 297 N.W.2nd 765. However, failure to establish that the prior offense was in fact a conviction by properly authenticated proof such as use of a computer printout sheet, does not establish proper proof of a prior conviction; hence, the enhanced punishment could not be imposed, **STATE vs. MANGELSEN**, supra.

Moreover, as per **STATE vs. ZIEMBA**, 216 Neb. 612, 346 N.W.2nd 208, not only must the complaint allege the facts charging the second or third offense DUI, but the record used to prove the prior conviction "must show that at the time of the conviction the defendant was represented by counsel or waived his right to counsel. In the absence of such evidence, the transcript of prior judgment which does not contain the affirmative

showing that either the defendant had counsel or waived his right to counsel, the record cannot be used to prove the prior conviction.".

Additionally, as per **STATE vs. TWEEDY**, 209 Neb. 649, 309 N.W.2nd 94, the prior-conviction record must show that the plea of guilty was freely, voluntarily and intelligently done after the defendant was fully advised of his rights to a jury trial, his right to confrontation of witnesses, and the privilege against self-incrimination, plus the record must affirmatively show that he was present at the time of the arraignment.

A closer analysis of **STATE vs. TWEEDY**, supra., reveals that even when the defendant is charged with a traffic infraction or a misdemeanor, the defendant is entitled to be informed of the nature of the charges against him, his right to

counsel and right of confrontation, plus jury trial right where authorized, and the privilege against self-incrimination. The record must affirmatively show that the defendant voluntarily and intelligently waived those rights. In absence of that, the prior-conviction evidence is insufficient, and the enhanced punishment may not be imposed, **STATE vs. MANGELSEN**, supra.

In the case at bar, Petitioner was clearly charged with only first offense, since there is no recitation of any prior conviction in the charge, and the prosecution did not contend at the sentencing that there was any prior conviction (App. 16).

The foregoing procedure is not merely localized in Nebraska but has been applied in other states with the same results as shown by the following cases.

PEOPLE vs. DAVIS, 94 Cal.App.3rd 218, 156 Cal.Rptr. 395, held that it was improper to strike from the complaint the allegation of the prior conviction for DUI.

STATE vs. GRENVIK, 291 Or. 99, 628 P.2nd 1195, held that an abstract of record on the back of a uniform traffic citation showing that the defendant was arraigned and pled guilty, but there was a blank for the name of his defense lawyer, was not sufficient to prove a valid prior conviction of a traffic infraction for the purpose of defendant's convicition of driving under the influence of intoxicants as a Class A misdemeanor under the statute where it appeared that the defendant was entitled to assitance of counsel at the prior proceeding and there was no waiver thereof. Thus, the Court held that it was reversible error to admit the abstract of

record before the jury, since it was not sufficient to prove a valid prior conviction.

Likewise, **STATE vs. BRISTO**, 71 Or.App. 219, 691 P.2nd 161, held that it was reversible error for the trial court to admit in evidence a record of a prior conviction indicating that the defendant was not represented by counsel when he pleaded guilty to the charge in an effort to enhance the punishment on a driving under suspension and driving under the influence of intoxicants charge.

See also **BALDASAR vs. ILLINOIS**, 446 U.S. 222, (1980), in which the Supreme Court overturned a felony sentence of imprisonment under an enhanced statute in which the defendant was prosecuted as a felony for theft of a $29 item and the prior conviction was based on an uncounseled misdemeanor theft.

STATE vs. NORDSTROM, 331 N.W.2nd 901, (Minn., 1983), held that a prior misdemeanor DWI conviction based on an uncounseled plea of guilty cannot be used to convert a subsequent DWI offense into a gross misdemeanor under Minnesota law absent a valid waiver of counsel on the record. There the procedure followed was the State charged the defendant with a gross misdemeanor DWI based on a prior misdemeanor DWI conviction occurring within five (5) years of the present offense. The defendant challenged the former conviction as a basis for the gross misdemeanor DWI in the pre-trial proceeding, at which the burden was on the State to show that the contested evidence, which was the prior conviction, "was obtained consistent with the constitutional requirements". Inasmuch as the State failed to show a valid waiver of

the defendant's right to counsel, the misdemeanor DWI conviction, based on the uncounseled plea of guilty, could not be used as a basis to enhance the punishment for the gross misdemeanor charge of DWI.

AARON vs. STATE, 546 S.W.2nd 277, holds, inter alia, that proof of prior convictions could not be satisfied by mere references thereto contained in letters in the defendant's penitentiary jacket.

PEOPLE vs. JOHNSON, 96 Mich.App. 652, 293 N.W.2nd 664, follows the bifurcated proceding in which the jury determines the guilt or innocence with respect to the current DUI offense, and in the second proceeding, if the defendant is convicted, the trial court determines the validity of the prior conviction, which also includes proof of a valid prior conviction and the identity of the defendant as the same person who committed the prior offenses.

Taking judicial notice of a prior conviction is insufficient and, therefore, constitutes erroneously imposed sentence, **PASCHAL vs. STATE**, 229 S.E.2nd 795, 139 Ga.App. 842.

Since this is a case of first impression, it remains only a simple matter to ingraft the foregoing authorities to Hawaii and follow them in enhanced punishment cases under **HRS §291-4** in much the same fashion as followed in other criminal cases for enhanced punishment as per the usual procedure followed in **STATE vs. MORISHIGE**, 65 Haw. 354, 652 P.2nd 1119, and its predecessors, **STATE vs. FREITAS**, 61 Haw. 262, 602 P.2nd 914.

Accordingly, since there is no question that a DUI charge is a criminal case in which the defendant is entitled to

a jury trial, **STATE vs. O'BRIEN**, 68 Haw. 39, ___ P.2nd ___, (1985), defendant is entitled to notice of the nature of the charges against him and the fact that the prosecution intends to rely on enhanced punishment, **STATE vs. MELEAR**, 63 Haw. 488, 630 P.2nd 619.

As provided in **STATE vs. MORISHIGE**, supra., proof of the prior conviction must show that the defendant was represented by counsel or a valid waiver thereof. In absence of such proof, the sentence must be set aside, **STATE vs. CALDEIRA**, 61 Haw. 285, 602 P.2nd 930.

In the case at bar, there was absolutely no compliance with any of the foregoing authorities and, hence, the earlier sentence or judgment was correct and should not have been amended. It was clearly abuse of discretion to do otherwise. Moreover, it arises to

constitutional dimension in violation of the Double Jeopardy Clause of the United States Constitution by increasing the sentence after the Petitioner had commenced serving his sentence by paying his fine and undertaking to perform the driver's education. **PEOPLE vs. SCANNER**, (1976), 70 Mich.App. 398, 245 N.W.2nd 767, (two-year probation sentence could not be vacated several days later and a sentence of ninety days incarceration imposed when test results indicated the defendant was using drugs); **STATE vs. FORD**, (1982, S.D.), 328 N.W.2nd 263, (resentencing defendant three days after the trial court orally imposed the initial sentence which was increased after the defendant had begun to serve it); **TINKER vs. STATE**, (1979), Tenn. Crim., 579 S.W.2nd 905 (An increase in the partially served sentence

violated double jeopardy); **EX PARTE LANGE**, 85 U.S. 163, (1874) (Enhanced punishment violates double jeopardy.); **NORTH CAROLINA vs. PEARCE**, 395 U.S. 711, (1969) (Double jeopardy and due process bar greater sentence on re-trial in the absence of intervening reasons for a stiffer sentence.).

In summary, there is no question that the Petitioner here was charged with DUI, first offense, under **HRS §291-4**, since there were no allegations of any prior conviction. Hence, the Petitioner had no notice that the State was claiming there was any prior conviction and, in fact, the prosecutor did not claim there was. If there were a prior conviction, the prosecution did not prove it by any competent evidence properly before the Court, nor was there any proof that, if there were a conviction, the Petitioner at

that time was represented by counsel or that he waived counsel as required by the authorities submitted herein. In short, the whole procedure offends not only due process of law as guaranteed by the **Fourteenth Amendment** to the **United States Constitution**, but it violates the double jeopardy provisions of the **Fifth Amendment** to the **United States Constitution.**

CONCLUSION

For each and all of the reasons presented in these arguments, Petitioner requests that the Court issue a Writ of Certiorari to review the judgment of the Supreme Court of the State of Hawaii entered in this case.

Respectfully submitted,

R. STEVEN GESHELL

Counsel for Petitioner

**IN THE SUPREME COURT
OF THE STATE OF HAWAII**

NO. 10797

STATE OF HAWAII,

Plaintiff-Appellee,

vs.

LAWRENCE WILLIAMS,

Defendant-Appellant.

APPEAL FROM DISTRICT COURT OF THE FIRST CIRCUIT--KOOLAUPOKO DIVISION

**HONORABLE RICHARD LUM, JUDGE
HONORABLE GOERGE PAI, JUDGE**

(Case Nos. TR 22 & TR 419)

June 17, 1986

LUM, C.J., NAKAMURA, PADGETT, HAYASHI AND WAKATSUKI, JJ.

PLAIN ERROR - validity of defendant's plea of guilty.

Although defendant does not seek to invalidate his guilty plea, this court may vacate his guilty plea under the plain error rule.

CRIMINAL PROCEDURE - guilty pleas.

A trial court violates HRPP 11(c) and the constitutional requirement that a guilty plea be knowingly entered when it fails to inform defendant of the penalties that may be imposed for the offense to which the guilty plea is offered, or inquire as to whether defendant knows or understands those penalties.

SAME - same.

Due process requires a trial court to vacate a defendant's guilty plea to a first offense charge and allow the defendant to enter a guilty plea to the second offense charge only after the trial court complies with HRPP 11 and affords the defendant his constitutional right to be informed of the second offense penalties.

OPINION OF THE COURT BY WAKATSUKI, J.

Defendant-appellant, Lawrence Williams, was arrested on March 9, 1985 for committing the offense of Driving Under the Influence of Intoxicating Liquor ("DUI"), Hawaii Revised Statutes (HRS) § 291-4(a). On May 8, 1985, he pleaded guilty and was sentenced to the penalties authorized under HRS § 291-4(b)(1) for a first offense DUI conviction. The district court was subsequently notified by the Division of Driver Education that defendant's traffic abstract showed defendant had a prior conviction for DUI in June of 1983. The parties were notified that a hearing for re-sentencing would be held on July 22, 1985. At the hearing and over defendant's objection, the court amended defendant's original sentence to impose the stiffer penalties required under HRS § 291-4(b)(2) for a DUI

offense occurring within five years of a prior DUI conviction.

Although defendant contends that the amended sentence should be vacated and the original sentence reinstated, we hold that defendant's guilty plea and sentence are void under the plain error rule. See Hawaii Rules of Penal Procedure 52(b); State v. Vaitogi, 59 Haw. 592, 593-94 n.4, 585 P.2d 1259, 1260-61 n.4 (1978).

I.

Rule 11(c) of the Hawaii Rules of Penal Procedure ("HRPP") states that:

> The court shall not accept a plea of guilty...without first addressing the defendant personally in open court and determining that he understands the following:
>
> (1) the nature of the charge to which the plea is offered; and
>
> (2) the maximum penalty provided by law...which may be imposed for the offense to which the plea is offered;
>
> ...

A trial judge is constitutionally required to ensure that a guilty plea is voluntarily and knowingly entered. See State v. Vaitogi, 59 Haw. 592, 595, 585 P.2d 1259, 1261 (1978); State v. Dicks, 57 Haw. 46, 49, 549 P.2d 727, 730 (1976). Although no specific dialogue is required, the court should make "an affirmative showing by an on-the-record colloquy between the court and the defendant wherein the defendant is shown to have a full understanding of what the plea of guilty connotes and its consequences." Vaitogi, 59 Haw. at 602, 585 P.2d at 1265.

The trial court accepted defendant's plea of guilty to the DUI charge without informing defendant of the penalties for a first offense DUI conviction or inquiring as to whether defendant knew or understood the penalties in violation of HRPP

11(c)(2) and the court's constitutional obligation to ensure that the guilty plea was voluntarily and knowingly entered. See Vaitogi, 59 Haw. at 598, 585 P.2d at 1263 (an appellate court cannot presume from a silent record that a quilty plea was understandingly given); id. at 601, 585 P.2d at 1264-65 (court is constitutionally obligated to inform defendant of the potential penalties). In view of the record of this case, we hold that the trial court committed plain error.

II.

At re-sentencing, defendant's due process rights were further violated when the trial court failed to vacate defendant's guilty plea and allow

defendant to enter a guilty plea to the second offense DUI charge only after complying with HRPP 11 and affording defendant his constitutional right to be informed of the second offense penalties.[1] See Vaitogi, 59 Haw. 592, 585 P.2d 1259.

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1. The prosecutor, himself, was not aware of defendant's prior conviction until after the plea was accepted. For immediately before accepting defendant's plea, the trial court asked defendant if this was his first conviction. When the prosecutor answered in the affirmative (the defendant did not respond), the court accepted the plea, stated that there was no prior conviction, and proceeded to sentence defendant to the first offense DUI penalties.

III.

Defendant's guilty plea and sentence are void and the case remanded for a new trial.

/s/ H. Lum
/s/ Edward H. Nakamura
/s/ Frank D. Padgett
/s/ Yoshimi Hayashi
/s/ J. H. Wakatsuki

IN THE SUPREME COURT
OF THE STATE OF HAWAII

No. 10797

STATE OF HAWAII,

Plaintiff-Appellee,

vs.

LAWRENCE WILLIAMS,

Defendant-Appellant.

MOTION FOR RECONSIDERATION

July 11, 1986

LUM, C. J., NAKAMURA, PADGETT, HAYASHI AND WAKATSUKI, JJ.

Per Curiam. The motion for reconsideration is denied without argument.

/s/ H. Lum
/s/ Edward H. Nakamura
/s/ Frank D. Padgett
/s/ Yoshimi Hayashi
/s/ J. H. Wakatsuki

IN THE SUPREME COURT
OF THE STATE OF HAWAII
OCTOBER TERM

No. 10797

STATE OF HAWAII,

Plaintiff-Appellee,

vs.

LAWRENCE WILLIAMS,

Defendant-Appellant.

JUDGMENT ON APPEAL

Pursuant to the Opinion of the Supreme Court of the State of Hawaii filed on June 17, 1986, the Defendant's guilty

plea and sentence are void and the case remanded for a new trial.

DATED: Honolulu, Hawaii, Jul 17, 1986.

BY THE COURT:
/s/ Sandra N. Yasui
Clerk

APPROVED:
/s/ James H. Wakatsuki
Justice

APPENDIX

IN THE DISTRICT COURT OF THE FIRST CIRCUIT
KOOLAUPOKO DISTRICT
STATE OF HAWAII

Case No. TR 22

STATE OF HAWAII,

Plaintiff,

vs.

LAWRENCE WILLIAMS,

Defendant.

TRANSCRIPT OF THE PROCEEDINGS ON MAY 8, 1985, BEFORE THE HONORABLE RICHARD LUM, JUDGE

MR. KOENIG: Case TR 22, Your Honor.

THE COURT: Step up, please.

MR. KOENIG: Lawrence Williams.

THE COURT: Koolaupoko, TR 22. Name for the record, please.

THE DEFENDANT: Lawrence Williams.

THE COURT: Name for the record, counsel.

MR. GESHELL: Good morning, Your Honor, Steven Geshell, on behalf of Lawrence Williams.

THE COURT: All right. I understand that there's a change of plea. Waive the reading of the charge?

MR. GESHELL: Yes, we waive the reading of the charge. We understand that these charges are for driving under the influence.

THE CURT (sic):Waive trial by jury?

MR. GESHELL: And waive the trial by jury and tender a guilty plea to the court, Your Honor.

THE COURT: All right. Before I accept your guilty plea, I'm going to ask Mr. Williams a series of questions.

Mr. Williams, you understand that under the Constitution of the United

States, as well as the State of Hawaii, you're entitled to a trial. By pleading guilty, you have given up a right to a trial, to cross examine the State witnesses or bring witnesses in your own defense; do you understand that?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: You understand that under the State Constitution, as well as the United States, you're entitled to a lawyer and in case you plead guilty, you've given up the right to a lawyer; do you understand that?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: Anybody force you to plead guilty?

THE DEFENDANT: No, Your Honor.

THE COURT: Do you have a clear mind?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Were any deals made by and between you and the Prosecutor to get you to plead guilty today?

THE DEFENDANT: No, Your Honor.

THE COURT: You did it voluntarily; is that correct?

THE DEFENDAN (sic): Yes, Your Honor.

THE COURT: The court, at this time, finds the defendant enters a plea of guilty, voluntarily and without force and coercion.

DO you understand what was your reading at the time, when you were picked up on March 9, 1985? Point --

MR. GESHELL: Point one-four, Your Honor.

THE COURT: Do you understand the reading was .14 in the intoxilyzer machine?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: Based upon the foregoing -- is this your first conviction?

MR. KOENIG: Yes, Your Honor.

THE COURT: Based upon the statement made by the defendant, together with the statement by the Prosecutor, the Court, at this time, finds the defendant enters a plea of guilty to driving under the influence of intoxicting (sic) liquor voluntarily without force and coercion; there is no prior conviction.

The Court, at this time adjudges the defendant guilty as charged and imposes the following sentence: directs the defendant to report to Driver's Education for 14 hours of DWI classes, suspends his driver's license for a period of 30 days absolutely, and for the next 60 days thereafter, conditional and restrictive, allows him to drive to and from work and

during working hours only and make him pay the fine of $150.

MR. GESHELL: Your Honor.

THE COURT: Yes, sir.

MR. GESHELL: We thank you very much and on the -- regarding the restrictive license, I have a letter from his employer that I would hand the Court and I've furnished the Prosecutor with that, and he has kind of a varied schedule since he's on call as a repairman or a test-man for Wang and so his working hours vary.

THE COURT: Well if that's during his working hours, he's covered under my conditional order. He is allowed to drive to and from work and during working hours only.

MR. GESHELL: Fine.

THE COURT: If he's picked up and cited, all he has to do, come to court and show us the proof on it because no use

arguing with the police officer. All he has to do -- he's doing his job. Is that it?

MR. GESHELL: Yes.

THE COURT: The Court, at this time, will receive in evidence the letter "To Whom It May Concern, dated by -- it's addressed by System Development Corporation, dated May 7, 1985". All right?

MR. GESHELL: Thank you, Your Honor.

IN THE DISTRICT COURT OF THE FIRST CIRCUIT
KOOLAUPOKO DISTRICT
STATE OF HAWAII

Case No. TR 419

STATE OF HAWAII,

Plaintiff,

vs.

LAWRENCE WILLIAMS,

Defendant.

TRANSCRIPT OF THE PROCEEDINGS ON JULY 22, 1985, BEFORE THE HONORABLE GEORGE PAI, JUDGE

MRS. MURPHY: Case 419, Lawrence Williams.

MR. GESHELL: Good morning, Your Honor, Steven Geshell, on behalf of the defendant.

MRS. MURPHY: Excuse me, Your Honor, this is on the move-on calendar.

It's my understanding that this case has been scheduled for re-sentencing as

the defendant was sentenced as a first offender but does have a 1983 conviction.

THE COURT: Okay, what have you got to say?

MR. GESHELL: Well, Your Honor, first off, we're opposed to any re-sentencing.

I don't know what the record is before the Court but at the time we appeared here, the first time on May the 8th, I believe it was; yes, the defendant was charged with first offense --

THE COURT: He was just charged at that time with a DUI offense.

MR. GESHELL: All right.

THE COURT: Nobody specifies whether it's first or second.

MR. GESHELL: Well then my argument is even stronger, Your Honor, because at that time, he had no notice that there was

any complaint against him or for enhanced punishment of second or third or whatever.

THE COURT: Well he should know better.

MR. GESHELL: Well, anyway, when the sentence came down, it was a valid sentence and the statute's applicable HRS Section 701-109 and 110 prohibit this. There's a 26 ALR 4th 905, which deals with this issue, which says you cannot increase or enhance a sentence once it's passed and once the defendant starts in with the sentence.

The Prosecutor did not charge the defendant with a second offense. In fact, on inquiry of the court, the Prosecutor said, "no, there was no second -- first offense, prior offense" so it was not before the court.

There's no evidence before the court about the prior offense --

THE COURT: There is no what?

MR. GESHELL: -- and this violates --

THE COURT: Section 701 what?

MR. GESHELL: Section 701-109 and 110.

THE COURT: Was there a trial?

MR. GESHELL: No; we simply came in and pled guilty, Your Honor.

THE COURT: Section 709?

MR. GESHELL: Section 701 --

THE COURT: Yes, 701.

MR. GESHELL: 109.

THE COURT: It's inapplicable. Where is it applicable?

MR. GESHELL: Because it prohibits a subsequent charge, such as in this case, a subsequent sentencing for the same offense, which previously occurred where the same elements constitute a lesser included offense.

THE COURT: Well --

MR. GESHELL: Also, I want to cite a couple of cases to the court here. State versus Melear, 63 HA 488 and State versus Afhong, 61 HA 281.

THE COURT: Yes, what does 61 Hawaii 281 say?

MR. GESHELL: 61 Hawaii 281, says that the State is required to show by satisfactory evidence that the defendant had a prior conviction and was represented by counsel or a waiver thereof, otherwise --

THE COURT: That's a criminal offense.

MR. GESHELL: That's what this is too.

THE COURT: Well, what else; 63 Hawaii 488?

MR. GESHELL: 488, yes, Your Honor.

THE COURT: What about it?

MR. GESHELL: That says that you're entitled to reasonable notice of the charges and the use for an extended term or a repeat offender; same kind of a situation, where you have enhanced punishment.

You've got to have reasonable notice of this stuff before you can do it validly and once the sentence is entered, that's it. Plus, he was not charged with the second offense.

THE COURT: Well, counsel, as far as I'm concerned, that's inapplicable.

The court will modify the sentence as if a second conviction; which is this: okay, license suspension, one year, to be effective as of the date his license was suspended in the prior sentencing matter; okay, 80 hours of community service work; $500 fine.

MR. GESHELL: Your Honor, I would ask the court to suspend the imposition of the sentence so that the defendant can appeal to the Supreme Court.

MRS. MURPHY: Your Honor, the State strongly objects to suspension of imposition of the sentence.

The purpose behind the sentencing is to get people with an alcohol problem off the road. Moreover, I'd like to make a few statements for the record, with respect to the sentence amendment. First of all, an illegal sentence can be corrected at any time and apparently when this sentence was originally imposed, they weren't aware of the first offense.

The court's action is amending the sentence --

THE COURT: Well just address the suspension, I've already sentenced him.

MRS. MURPHY: Certainly, Your Honor. It is just that, that in --

THE COURT: Okay, motion denied.

IN THE DISTRICT COURT OF THE FIRST CIRCUIT

KOOLAUPOKO DISTRICT

STATE OF HAWAII

STATE OF HAWAII

vs.

LAWRENCE WILLIAMS,

Defendant.

ORAL CHARGE

You're charged that on or about March 9, 1985, in the Koolaupoko District, City and County of Honolulu, State of Hawaii, you operated or assumed actual physical control of the operation of any vehicle while under the influence of intoxicating

liquor, violating 291-4(a)(1) HRS, committing the offense of Driving Under the Influence of Intoxicating Liquor; and

You're charged that on or about March 9, 1985, in the Koolaupoko District, City and County of Honolulu, State of Hawaii, you operated or assumed actual physical control of the operation of any vehicle with 0.10% or more, by weight of alcohol in your blood, violating 291-4(a)(2) HRS, committing the offense of Driving Under the Influence of Intoxicating Liquor.